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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

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SUPREME COURT, U.S.

No. 82-5147

CHARLES LAVERN SINGLETON

PETITIONER

vs.

STATE OF ARKANSAS

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTION PRESENTED FOR REVIEW

Whether a capital defendant's Fifth, Sixth, Eighth and Fourteenth Amendment rights are violated when a State supreme court denies, without opinion, a petition for permission to seek an evidentiary hearing in State trial court pursuant to State rules and statutes providing a procedure for postconviction review of collateral constitutional issues after affirmance on direct appeal of a state conviction.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions relied upon by petitioner and set out in his petition are not reiterated here.

Ark. Stat. Ann. §43-2725 (Repl. 1977). Matters to be considered on appeal. -- The Supreme Court need only review those matters briefed and argued by the appellant provided that where either a sentence for life imprisonment or death, the Supreme Court shall review all errors prejudicial to the rights of the appellant.

Ark. S. Ct. R. 11(f), Ark. Stat. Ann. Vol. 3A (Repl. 1979)

* * *

When the sentence is death or life imprisonment, the Court must review all errors prejudicial to the appellant. ...To make that review possible the appellant must abstract all objections that were decided adversely to him in the trial court, together with such parts of the record as are needed for an understanding of the objection. The Attorney General will make certain that all objections have been so abstracted and will brief all points argued by the appellant and any other points that appear to him to involve prejudicial error.

SUMMARY OF RESPONDENT'S ARGUMENT

I.

Petitioner has pending in the federal District Court a petition for writ of habeas corpus, alleging at least nineteen (19) violations of his federal constitutional rights in addition to the issue raised here. The District Court took juris-

diction to grant a stay of execution. If, as petitioner alleges, an evidentiary hearing is necessary to explore and resolve the issues he presented to the Arkansas Supreme Court in his petition for Rule 37 relief, that remedy is available in the federal District Court, if appropriate. For this Court to review one issue which has nothing to do with error in his conviction or sentence would only prolong and confuse the litigation in this case, as it can be presumed that petitioner has every intention of pursuing his numerous other allegations through the federal court system.

II.

This Court has never held that a state is required to provide any procedure for postconviction relief. Arkansas is therefore certainly not required to provide a procedure that automatically affords an evidentiary hearing without a clear showing by the petitioner that such a hearing is justified on the grounds alleged. The Arkansas Supreme Court followed the procedure specified in Rule 37 and applied the standard of review established in prior case law. Petitioner's conviction and sentence were afforded a higher standard of review on direct appeal, as required by statute and rule, because he received the death penalty. There is no Arkansas provision requiring the Arkansas Supreme Court to afford greater scrutiny to allegations made in a Rule 37 petition, and this Court has never held that a state is required to afford more stringent review in a postconviction proceeding, simply because the death penalty was imposed. There is thus no federal question presented.

REASONS FOR DENYING THE WRIT

I. PETITIONER IS CURRENTLY LITIGATING THE ISSUE PRESENTED HERE, AS WELL AS AT LEAST NINETEEN (19) OTHERS, IN A PETITION FOR WRIT OF HABEAS CORPUS IN THE FEDERAL DISTRICT COURT.

This Court should refuse to grant certiorari in this case because petitioner is currently litigating the same issues in federal District Court in a petition for writ of habeas corpus. His habeas petition is filed herewith in respondent's appendix. Paragraphs 21 and 22 raise the issues presented here, and paragraph 23 requests leave to amend the petition. The habeas petition was filed June 1, 1982, almost two (2) months prior to petitioner's filing of his petition for writ of certiorari. The District Court assumed jurisdiction and granted a stay of execution. The order granting the stay is enclosed in respondent's appendix.

This Court has recently indicated its concerns about possible abuses of judicial economy, especially regarding the writ of habeas corpus. Engle v. Isaac, 102 S.Ct. 1558, 1571 (April 5, 1982).

It is obviously not judicially economical for this Court to review an issue which is being litigated simultaneously in a lower federal court. This is especially true, if, as petitioner alleges, full development of the facts of the issues presented to the Arkansas Supreme Court in his petition for relief pursuant to Ark. R. Crim. P. 37, Ark. Stat. Ann. Vol. 4A (Repl. 1977 & Cum. Supp. 1981), is critical to an adequate review of his conviction and sentence. The denial of an evidentiary hearing about which petitioner so vehemently complains can be remedied, if appropriate, in the federal District Court. By awaiting the outcome of that litigation, this Court will have a later opportunity to review more fully the conviction and sentence, if the District Court's opinion is appealed and certiorari is then sought. While respondent would certainly not deny petitioner's right to have his State

conviction reviewed in the federal courts, it strongly objects to repetitive, overlapping and piecemeal litigation of the issues presented. This Court held in Rice v. Sioux City Cemetery, 349 U.S. 70, 77 (1954) that it "should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute." As the Court will note from the habeas petition, petitioner has raised at least nineteen (19) more issues there than he has in his petition for writ of certiorari. Granting certiorari at this time could only resolve a small fraction of the issues petitioner deems significant for federal review.

Justice Rehnquist has urged the Court to review at an early stage cases in which the defendant has received the death penalty as one effort to stem the ever-increasing tide of post-conviction litigation in those cases. Coleman v. Balkcom, 451 U.S. 949, 956 (Rehnquist, J., dissenting).

However, since a decision on the issue presented here would not be dispositive of either petitioner's conviction or his sentence, the granting of certiorari in this case would only serve to prolong and confuse the litigation, rather than to expedite it.

II. THE ARKANSAS SUPREME COURT PROVIDED CONSTITUTIONALLY ADEQUATE POSTCONVICTION REVIEW TO PETITIONER.

Petitioner alleges that he was denied his Fifth, Sixth, Eighth and Fourteenth Amendment rights because the Arkansas Supreme Court denied him an evidentiary hearing in the state trial court pursuant to the Arkansas provision for postconviction relief, Ark. R. Crim. P. 37, Ark. Stat. Ann. Vol. 4A (Repl. 1977 & Cum. Supp. 1981), (hereafter Rule 37).

At the threshold of this issue is the fact that this Court has never held that the Constitution compels the states to provide specific postconviction procedures to persons claiming violations of their federal constitutional rights. Carter v. Illinois, 329 U.S. 173 (1946). Rather, this Court has stated that though the Constitution commands the states to assure fair judgment, wide

discretion is left to the states in deciding the manner of adjudicating a claim that a conviction is unconstitutional.

Young v. Ragan, 337 U.S. 235, 238 (1948); Hysler v. Florida, 315 U.S. 411 (1946). As the Court stated in Carter, 329 U.S. at 175-76:

Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A State may decide whether to have direct appeals in such cases, and if so under what circumstances.... In respecting the duty laid upon them by Mooney v. Holohan, States have a wide choice of remedies. A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of habeas corpus or coram nobis. It may use each of these ancient writs in its common law scope, or it may put them to new uses; or it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention... So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated. [Citations omitted.]

This philosophy was reaffirmed in Young, 337 U.S. at 238, wherein it was emphasized that "Illinois may choose the procedure it deems appropriate for the vindication of federal rights." The most revealing statement of the deference afforded states in fashioning postconviction remedies is found in Justice Jackson's concurring opinion in Brown v. Allen, 344 U.S. 443, 541 (1953) (emphasis added):

The states will allow some appeal from a judgment of conviction which permits review of any question of law, state or federal, raised upon the record. No state is obliged to furnish multiple remedies for the same grievance. Most states, and with good reason, will not suffer a collateral attack such as habeas corpus to be used as a substitute for or duplication of the appeal. A state properly may deny habeas corpus to raise either state or federal issues that were or could have been raised on appeal. Such restriction by the state should be respected by federal courts.

In Hysler, an individual convicted of murder sought a writ of coram nobis from the Supreme Court of Florida which had affirmed

his conviction on direct appeal three years earlier. The Florida Supreme Court refused to grant the petition. The United States Supreme Court granted certiorari on the question of whether due process had been denied the petitioner because of the alleged use of perjured testimony by the prosecution at trial. In affirming the denial of the writ, the Court found that Florida's postconviction process met the requirements of due process.

Describing the case an "unedifying story in the administration of criminal justice," id. at 415, the Court noted that the petitioner raised his claim "after leaden footed justice had reached the end of the familiar trail of dilatory procedure." Id. at 417. The Court held at 422:

However ineptly the Florida Supreme Court may have formulated the grounds for denying the application, its action leaves no room for doubt that the Court deemed the petitioner's claim without substantial foundation. We construe its finding...to mean that the petitioner had failed to make the showing of substantiality which, according to the local procedure of Florida, was necessary in order to obtain the extraordinary relief.

In Case v. Nebraska, 381 U.S. 336 (1965), this Court was asked to decide whether the Fourteenth Amendment requires the states to afford state prisoners some corrective postconviction process. The Court found that Nebraska, in adopting a post-conviction remedies statute, obviated the necessity of answering the question. This Court merely stated that postconviction remedies are "desirable." Id. at 346. Justice Brennan's concurring opinion in Case, 381 U.S. at 347, makes clear that:

There is no occasion in this case to decide whether due process requires the states to provide corrective process. The new statute (the Nebraska postconviction relief provision) on its face is plainly an adequate corrective process. Every consideration of Federalism supports our conclusion to afford the Nebraska courts the opportunity to say whether that process is available for the hearing and determination of petitioner's claim.

Petitioner has failed to raise an issue of constitutional magnitude because this Court has never held that the State equivalent of habeas corpus review is required under the United States

Constitution; it has also held that where such opportunity for relief is afforded, the scope of that review and the procedure by which relief may be granted is within the discretion of the State.

Petitioner cites numerous capital cases in which the Arkansas Supreme Court has denied evidentiary hearings in the trial court pursuant to Rule 37. He alleges, however, that he has been treated differently because the Arkansas Supreme Court did not provide a written opinion denying him relief. The Arkansas Court has repeatedly noted the misunderstanding of petitioners regarding the scope and availability of Rule 37 relief. See, e.g., Woodard v. State, 273 Ark. 235, 240, 617 S.W.2d 861, cert. denied, 69 L.Ed.2d 603 (Nov. 16, 1981); Collins v. State, 271 Ark. 825, 828, 611 S.W.2d 182, cert. denied, 452 U.S. 973 (1981); Hulsey v. State, 268 Ark. 312, 595 S.W.2d 934, reh. denied, 268 Ark. 315, 599 S.W.2d 729, cert. denied, 449 U.S. 938 (1980). Especially in death cases, Rule 37 petitions have reflected shotgun attempts to raise every conceivable issue, whether procedurally barred, proper for Rule 37 consideration or factually or legally sound. See, e.g., Miller v. State, 273 Ark. 508, 509, 621 S.W.2d 482 (1981); Hulsey, 268 Ark. at 313, 315. Petitioner's Rule 37 petition was similar. The fact that it was denied without a response from the State is even more strongly indicative of its lack of merit.

This Court should presume that the Arkansas Supreme Court properly considered the issues presented and determined that they were either vaguely and inadequately raised, unsupported or refuted by the record, or improper for Rule 37 relief. In at least one case, this Court has held that, in the absence of an opinion indicating otherwise, it would presume that the judgment might have rested on a nonfederal ground, and that it would not take jurisdiction to review the judgment. Stembridge v. Georgia, 343 U.S. 541, 547 (1952). There was no indication in Stembridge that lack of an opinion is inherently prejudicial or that a defendant is constitutionally entitled to one.

Petitioner asks this Court to remand the case and require the Arkansas Supreme Court to explain the grounds on which it denied Rule 37 relief. He cites Zant v. Stephens, 102 S.Ct. 1856 (May 3, 1982), in support of that request. Stephens is of no help to petitioner, however. It involved an ambiguous opinion on direct appeal, and the Court remanded for a clarification of the state-law premises of the Georgia Supreme Court's interpretation of the statutory scheme for imposition of capital punishment in that state. That case also involved the reversal by the United States Court of Appeals for the Fifth Circuit of the holdings of both the Georgia Supreme Court and the federal District Court. Stephens may easily be read as allowing a State supreme court to justify its interpretation and application of its statutes when the death sentence is vacated by a federal court.

Petitioner filed his Rule 37 petition pursuant to Rule 37.2(a) after having already prosecuted a direct appeal to the Arkansas Supreme Court. That provision requires the permission of the Arkansas Supreme Court before the defendant may return to the trial court with his contentions. The logical purpose of this provision is obvious: Rule 37 is designed to afford the opportunity for relief to those defendants who have not otherwise had an opportunity for review of the claims of constitutional deprivation. It is not intended as a second appeal procedure. Collins, 271 Ark. at 828. However, there is no unconditional right pursuant to Rule 37 to an evidentiary hearing in the trial court, whether the defendant originally prosecuted an appeal or not. Any right granted is based on the substance and strength of the grounds alleged.

Petitioner further argues that the fact that the death penalty was imposed in his case warrants a different standard of review. This is true to some extent. The Arkansas Supreme Court affords a much more stringent review on appeal of death penalty cases, both by statute and rule. Ark. Stat. Ann. 543-2725 (Repl. 1977); Ark. Sup. Ct. R. 11(f), Ark. Stat. Ann. Vol. 3A

(Repl. 1979). See also Collins v. State, 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U.S. 878, reh. denied, 434 U.S. 977 (1977). Section 43-2725, which was in effect when petitioner was tried, provides that in such cases, the Arkansas Supreme Court "shall review all errors prejudicial to the rights of the appellant." This has been construed by the Arkansas Court to mean "that this mandated review required an examination of the trial record, even though the objectionable action which might be reversible error was not argued on appeal in any way." Collins, 261 Ark. at 216.

Pursuant to a prior similar statute, the Arkansas Court has, in at least four cases, reversed convictions involving the imposition of the death penalty on issues raised neither at trial nor on appeal. Walton v. State, 232 Ark. 86, 334 S.W.2d 657 (1960); Alford v. State, 223 Ark. 330, 332, 266 S.W.2d 804 (1954); Smith v. State, 205 Ark. 1075, 172 S.W.2d 249 (1943); Webb v. State, 154 Ark. 67, 242 S.W. 380 (1922). See also Gruzen v. State, 267 Ark. 380, 591 S.W.2d 342 (1979), cert. denied, 449 U.S. 852 (1980).

The Arkansas Supreme Court reviewed petitioner's allegations and found that he did not raise issues requiring an evidentiary hearing. That holding was firmly based on prior interpretations of the purpose and scope of Rule 37 review, as well as on the substance of the allegations themselves. Petitioner is not entitled to more.

CONCLUSION

This Court should deny the writ because the identical issue, as well as at least nineteen (19) others are currently pending in federal District Court. Even resolution of this issue in petitioner's favor at this point would not reach the constitutionality of his conviction or sentence, and it can be presumed that he will continue to pursue federal review of the other issues. It can be presumed that his case will ultimately be presented to this Court again after a thorough review, including an evidentiary hearing, if appropriate, in the lower federal courts.

Review of this issue at this time would be premature and would result in piecemeal, repetitious and wasteful utilization of the judicial process.

Petitioner has failed to raise an issue of the denial of due process because of the Arkansas Supreme Court's refusal to grant him an evidentiary hearing on his allegations and to write an opinion explaining that refusal. This Court has never held that State courts must afford any postconviction review or relief; it has certainly not held that such review must take the form of an evidentiary hearing or that an opinion must be written.

Petitioner's conviction has now been reviewed twice by the Arkansas Supreme Court. A higher standard of review was required and applied on direct appeal because the death penalty was imposed. Petitioner was afforded constitutionally adequate review of the conclusory and speculative allegations raised in his Rule 37 petition. The Arkansas Court properly found no constitutional deprivation and afforded him no relief. There simply is no basis in federal constitutional law for finding that the scope of Rule 37 review was constitutionally inadequate.

This Court should therefore deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Victra L. Fewell, Assistant Attorney General, do hereby certify that a copy of the foregoing pleading has been served on petitioner herein, by mailing a copy of same, postage prepaid, addressed to his attorney, Jeffrey M. Rosenzweig, 420 Three Hundred Spring Building, Little Rock, Arkansas 72201, this 2nd day of September, 1982.

Victra L. Fewell
VICTRA L. FEWELL